Supreme Court, U. S.
FILED
MAY 19 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1453

NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SAN FRANCISCO NEWSPAPER PRINTING CO. INC.,
Respondent,

and

DOUGLAS BROWN, WALTER DELONG, PHILIP T. WALKER, MARVIN W. WEISSENSEE, KENNETH C. WOLLMAN, JOHN ROY CONWAY, LEROY LESTER HOLBROOK, DARRELL E. BAKER, and WILLIS P. KOLB,
Respondents.

Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

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Respondents.

Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

Newspaper and Periodical Drivers & Helpers Union, Local No. 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America petitions

for the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment of February 18, 1975 entered against petitioner.

OPINIONS BELOW

The opinion of the court below is reported at 509 F.2d 99, and is printed as Appendix "A" to this petition. The Supplemental Decision and Order of the National Labor Relations Board, which was before the court below on petitions for review and for enforcement, is reported at 204 NLRB No. 60, and is printed in Appendix "C" to this petition.

JURISDICTION

The opinion of the court below was entered on December 23, 1974, and the judgment of the court below was issued on February 18, 1975. The Court has jurisdiction of the proceeding under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether a clause in a collective bargaining agreement which continues a historical practice of progressively expanding a bargaining unit of distribution employees of metropolitan newspapers into suburban areas violates Section 8(e) of the National Labor Relations Act where its effect is to terminate dealerships of independent contractors who previously performed suburban distribution work.

STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this case is Section 8(e) of the National Labor Relations Act (29 U.S.C. Section 158(e)), which insofar as applicable reads as follows:

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such

> employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:"

STATEMENT OF THE CASE

1. The Parties

Petitioner, hereafter referred to as the Union, has long represented the drivers who distribute the metropolitan newspapers in San Francisco, California. Respondent San Francisco Newspaper Printing Co., Inc., hereafter referred to as the Company, is jointly owned by, and performs the printing, sales, promotion and distribution work for the two major daily newspapers in San Francisco, The San Francisco Chronicle and The San Francisco Examiner. The Union and the Company have had a collective bargaining relationship since 1965, when the Company was organized. Prior to that time, and dating back to 1937, the Union was party to a series of collective bargaining contracts with all of the daily newspapers in San Francisco, each of which operated its own distribution system. In 1937 there were four dailies, all of which bargained as a group with the Union until 1959 (G.C. Exh. 26-47).[1] One of the dailies ceased publication in 1959, and another went out of business in 1965, when the remaining two, The Chronicle and The Examiner, formed the Company.

The Company's circulation department maintains separate divisions for "City" and "Suburban" distribution.

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1. Exhibits in the record below are referred to by the designations "G.C." (General Counsel), "Union" and "Company", respectively. Reference to the Transcript of the Proceedings before the Board are designated "Tr."

Home delivery in the City area is handled by so-called District Managers, and distribution for City street sales is handled by Street Salesmen, both of which classifications are employees covered by the collective bargaining agreement between the Company and the Union (Tr. 1921, 1964, 1966; G.C. Exh. 2) Suburban distribution, which extends to outlying areas within a fifty mile radius of San Francisco, is handled on a mixed basis. Some of the distribution personnel in these areas are called wholesalers, and are employed by the Company covered by the agreement with the Union. Others are called Dealers, whom the Court below has determined to be independent contractors. Both groups perform identical functions. Newspapers are brought to the wholesalers or dealers as the case may be, by Company employed drivers who are covered by the Union agreement, and then are distributed to home subscribers, newsstands and vendors through adult carriers or carrier boys (Tr. 1976, 1977, 1980, 1981, 1821-1828, 1318, 1319). The work involved is also substantially identical with that performed by the District Managers in the City Division (Tr. 964, 1975).

The individual respondents in this case are Dealers, i.e., independent contractors who perform distribution work in the Suburban areas. The respondent Dealers filed the unfair labor practice charges which initiated this case before the Board, and have been active parties at all phases of the proceedings.

2. The Proceeding Before the Board and the Court Below

The charges filed with the Board alleged that a provision of the collective bargaining agreement between the Company and the Union, described more fully below, violates Section 8(e) of the Act because it requires the Company to terminate certain Dealer contracts. Following the issu-

ance of a complaint and a hearing, the Board concluded that the Dealers were employees rather that independent contractors, and accordingly that Section 8(e) did not apply to an agreement which affected their tenure with the Company, 194 NLRB No. 4 (1971). The complaint was thereupon dismissed. The respondent Dealers sought review of the Board's decision in the court below, which subsequently reversed the Board and held that the Dealers were independent contractors. 462 F.2d 699 (C.A. 9, 1972). The proceeding was remanded to the Board for determination of the Section 8(e) question, which the Board had not passed on in view of its holding that the Dealers were employees. Pursuant to the remand, the Board issued a Supplemental Decision and Order, finding that the disputed contract provision does not have a lawful primary work preservation object, and therefore violates Section 8(e) of the Act (Appendix "C", *infra.*). On review, the court below sustained the Board's decision (Appendix "A", *infra*). The present petition is limited to the Section 8(e) question; the Union does not request review of the determination that the Dealers are independent contractors.

3. The Disputed Contract Clause and Its History

The initial agreement between the Union and the Company's predecessors in 1937 covered distribution employees in both the San Francisco City and Suburban areas "within a radius of fifty (50) miles of San Francisco", but expressly excluded Dealers (G.C. Exh. 26, Sections 1 and 2). Then, as now, distribution in the outlying areas was carried on in part by employees and in part by Dealers, who in the original contract were described as working under "lease, unit system, ownership or route man systems" (*ibid.*). The provisions which made this distinction in contract coverage

have been carried forward without relevant change in the twenty contracts negotiated between the parties between 1947 and the 1963 agreement which is challenged in the present proceeding (G.C. Exh. 3, 26-51).

As early as 1938, however, the agreement between the parties recognized that the work performed by Dealers fell within the Union's "jurisdiction," and provided for a gradual extension of the agreement to such work if and when the newspaper publishers terminated the individual independent contracts with those particular individuals (G.C. Exh. 26). Thus, the Union claimed the right to have employees replace dealers as early as 1938, but the conversion of Dealer to employee was left to the publisher's decision.

In 1955, for the first time, the collective bargaining agreement contained a provision, substantially identical to the clause before the Court, which required the publishers to terminate dealerships in accordance with a time schedule and in specified areas, and thereafter to have the work performed by employees working under the Union agreement (G.C. Exh. 44, Section 1(b)). Each subsequent agreement up to and including the agreement involved in this case contained similar language and extended the area in which the publishers (the Company only, since 1965) were required to terminate dealerships and bring the work within the collective bargaining unit (G.C. Exhs. 45-50). As a result, by 1968 dealerships had been terminated and the work assigned to wholesalers in numerous suburban communities in Alameda, Contra Costa, San Mateo, Santa Clara and Marin Counties.[2] In most instances, the Dealer was offered

2. The expansion of the bargaining unit under these provisions of the agreements between 1955 and 1968 is shown in chart form in Appendix "E", *infra*.

employment as a wholesaler when his route was converted, and the same individual continued to perform the work under the collective bargaining agreement.

The full text of the contract clause which has been found in violation of Section 8(e) of the Act appears in Appendix "D", *infra*. In summary, the first paragraph of the clause describes the kind of work covered by the agreement, and specifies the City and Suburban areas "within a radius of fifty (50) miles of San Francisco," where the agreement has application. The second paragraph indentifies areas and provides dates upon which the dealerships in effect for such areas shall be terminated, and the work brought within the coverage of the agreement. It is also provided that the Company may offer the Dealer affected the right "to continue in that same territory as an employee working under Union jurisdiction."

The historical motivation of the Union in insisting upon the expansion of its bargaining unit into the outlying areas was its recognition of the fact "that the people are moving out of the metropolitan areas and moving into the suburban areas" (Tr. 1974, 1801). The Union was apprehensive that an increase in suburban population would increase job opportunities in those areas with a corresponding decrease in job opportunities in San Francisco proper.

The facts bear out the Union's premonitions. For instance, in 1938 the newspaper circulation in Marin County was only 600 as compared with the present 33,000 (Tr. 1865, C.P. 57). In 1940 approximately 400 Union members were employed by the newspapers in the bargaining unit (Tr. 1883). By 1946 the number of jobs had declined to about 260, primarily because of World War II (Tr. 1883). There was a gradual increase in employment in the bargaining unit and by 1950 there were about 500 jobs (Tr. 1918). The

current number of jobs in the bargaining unit is about equal to the number of jobs in 1965, because of the loss of city jobs and the increase in suburban jobs (Tr. 1913, 1915, 1916). There are presently about 500 wholesalers in the bargaining unit, the same as in 1950 (Tr. 1909, 1918, E.28). More than half the people working in the wholesaler classification under the jurisdiction of the Union are employed in the suburban areas (Tr. 1909, Co. Exh. 28).

4. The Decisions of the Board and the Court Below

The Board rejected the Union's contention that the disputed contract clause has a primary work preservation objective, which would concededly "insulate it from a Section 8(e) violation" (Appendix "C", *infra*). According to the Board, the gradual expansion of the bargaining unit for which the clause provided would "cover geographical areas never within the unit, where any increase in the amount of work done by the independent dealers would not itself cause any decrease in the amount of work available to unit employees." (*ibid.*). The Board was "persuaded that the provision for termination of the dealers' contracts is aimed principally at the non-union independent dealers, not at the primary employer," and that "the work preservation aspect of the contract terminations under attack . . . is incidental to the cessation of doing business instead of the other way around." (*ibid.*).

The discussion of the Section 8(e) question in the opinion of the court below is summary. The opinion states simply that "The Board correctly found that 'work preservation' was not the primary object of the contract termination provisions, and in so doing it properly applied the rule of *National Woodwork Manufacturers Assoc. v. N.L.R.B.*, 386 U.S. 612 (1957)." (Appendix "A", *infra*).

REASONS FOR GRANTING THE PETITION

1. This case presents an important question in the application of the principles of *National Woodwork Manufacturers Association v. National Labor Relations Board*, 386 U.S. 612 (1957), to the relationship between union, employer and individual independent contractors. In the cited case the Court affirmed the rule, which had largely been accepted in the courts of appeal, that Section 8(e) of the Act reflected the same distinction between lawful primary union activity and unlawful secondary activity which had developed under Section 8(b)(4) of the Act. *National Woodwork Manufacturers Association* presented a conventional situation in which two or more separate employers were involved, each with its own employees, and the union agreement was directed at securing job opportunities with the employer under contract with it, to the detriment of other employers. In the present case, the competition for jobs lies between employees covered by a collective bargaining agreement and individual independent contractors, called Dealers, who perform the same kind of work as that covered by the Union agreement. Job competition between these groups is not limited to the newspaper industry. See, for example, *Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772 (C.A.3, 1967), and this Court's decision in *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959). The impact of Section 8(e) upon collective bargaining agreements which protect the interest of bargaining unit employees in this competition presents a question of widespread application which should be resolved by this Court.

2. The Board and the court below have erred in finding an absence of a lawful primary objective in the disputed clause in this case. Their application of the ruling in *National Woodwork Manufacturers Association v. National*

Labor Relations Board, supra, is wrong, and should not be permitted to stand.

(a) The bargaining unit expansion clause which has been held unlawful in this case is the current expression of more than twenty years of continuous recognition in the bargaining relationship between the Union and the Company that work performed by Dealers is in direct competition to and threatens the job security of employees in the bargaining unit. The work performed by the two groups is identical for all purpose relevant to Section 8(e) of the Act. The shift in population from metropolitan San Francisco to the suburban areas would have inevitably produced, absent contract protection, an ever increasing amount distribution work performed by Dealers, and a corresponding decrease in distribution work performed by bargaining unit employees. The practical question before the Union in 1938 was the same as in 1968, i.e., whether steps could be taken to protect job opportunities for bargaining unit employees in the face of population changes that would continuously shrink the amount of bargaining unit work available.

Contract clauses which reflect union claims for work which is essential to the protection of the bargaining unit have been recognized by courts of appeal not to infringe upon the area of unlawful secondary activity circumscribed by Section 8(e) of the Act. *Teamsters Local 710 v. N.L.R.B.* 335 F.2d 709 (C.A.D.C., 1964): *Canada Dry Corp. v. N.L.R.B.*, 421 F.2d 907 (C.A.6, 1970). Compare, *Retail Clerks Local 648 (Brentwood Markets),* 171 NLRB 1018 (1963): *Retail Clerks Local 775 (Associated Food Stores),* 186 NLRB 664 (1970): *Retail Clerks Local 648 (Cala Foods),* 173 NLRB 1711 (1968) As shown in these decisions, the circumstance that such agreements require a cessation

of business between the primary employer and other persons is not controlling under Section 8(e). In the present case, the function and purpose of the disputed clause was to protect the continued existence of job opportunities within the bargaining unit, and its impact upon the Dealers was no more than this primary objective required. A proper application of this Court's reasoning in *National Woodwork Manufacturers Association, supra,* legitimizes an agreement which serves this objective.

(b) The holding of the Board and the court below is inconsistent with the established decisional rule that Section 8(e) does not prohibit agreements which forbid all subcontracting, or agreements which allow subcontracting only to employers who pay the same labor costs as those required in the collective bargaining agreement. Such agreements are primary in nature because their purpose is to protect bargaining unit jobs by eliminating incentive to contract with other persons to perform bargaining unit work. *Orange Belt District Council of Painters No. 48 v. N.L.R.B.,* 328 F.2d 534 (C.A.D.C., 1964); *Teamsters Local 710 v. N.L.R.B.,* 335 F.2d 709 (C.A.D.C. 1964).

The effect of the disputed clause in the present case is to prohibit altogether dealership contracts (the subcontracting of work to Dealers), but to accomplish this ultimate goal on a gradual basis so as to avoid disruption of the Company's business requirements. The termination of dealerships is in no way conditional upon the labor policies of the Dealers. Regardless of how the Dealer may choose to operate his business, his dealership will be terminated. There is, accordingly, no "tactical object" in the disputed clause in this case to achieve union goals in other employment relationships. Rather, "the agreement or its mainten-

ance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" *National Woodwork Manufacturers Association v. National Labor Relations Board*, 386 U.S. 612, 645 (1967).

(c) The Board states in its decision that "no substantial work opportunity would necessarily be added for employees from the pre-existing unit [upon termination of the dealerships], but rather there would be new employees who must become unit members" (Appendix "C", *infra*). This conclusion reflects a static concept of a bargaining unit which cannot accommodate to economic changes. If adopted as an approach to the interpretation of Section 8(e) it would effectively prevent unions from protecting unit work from inevitable changes which encroach on bargaining unit jobs. This notion was expressly rejected in *Teamsters Local 710 v. N.L.R.B.*, 335 F.2d 709 (C.A.D.C., 1964), and must be rejected here.

It is true that new employees are brought into the bargaining unit upon termination of a dealership, and indeed it is likely that the terminated Dealer will be given the opportunity to work as a member of the bargaining unit. This process, however, does not expand the volume of bargaining unit work. The history of the operation of the disputed clause shows that it has had the effect of merely maintaining the pre-existing size of the bargaining unit in the face of the increasing jobs in the suburban areas, and that but for the clause the bargaining unit jobs would have substantially diminished. There is nothing unlawful or secondary in a contract provision under which the bargaining unit merely holds its own against outside competition. Section 8(e) cannot properly be interpreted to prohibit this minimum effort to protect bargaining unit work.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that a writ of certiorari should issue to the Court of Appeals for the Ninth Circuit to review the judgment in this case.

May 16, 1975.

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Appendix A

United States Court of Appeals
for the Ninth Circuit

NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL NO. 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 73-3595
DOUGLAS BROWN, WALTER DELONG, PHILLIP T. WALKER, MARVIN W. WEISSENSEE, KENNETH C. WOLLMAN, JOHN ROY CONWAY, LEROY LESTER HOLBROOK, DARRELL E. BAKER, WILLIS P. KOLB, *Cross-Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 73-3596
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. SAN FRANCISCO NEWSPAPER PRINTING COMPANY, INC., *Respondent.*	No. 73-3597

OPINION

[December 23, 1974]

On Petition and Cross-Petition for Review
of Supplemental Decision and Order
of
National Labor Relations Board

Before: CHAMBERS and KILKENNY, Circuit Judges, and JAMESON, District Judge.*

*The Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

PER CURIAM:

Before the court are the respective petitions of Newspaper & Periodical Drivers & Helpers Union, Local #921 (Union) and the nine charging parties, individuals who are non-unionized newspaper distributors (Dealers) for San Francisco Newspaper Printing Company, Inc. (Company), to review a supplemental decision and order of the National Labor Relations Board (Board) reported in 204 N.L.R.B. No. 60. The supplemental decision and order followed our remand of an earlier Board decision and order. *Brown v. N.L.R.B.*, 462 F.2d 699 (CA9 1972). The Board has filed a cross-application for enforcement of its supplemental order. The Union first sought review of the subject in the United States Court of Appeals for the District of Columbia Circuit, followed by the Dealers' request for review and change of venue. A change of venue was granted, and the consolidated cases were transferred to this court for further proceedings. A full statement of the facts is found in the Board's decision.

Our review convinces us that there is substantial evidence on the whole record to support the Board's findings that the Union and the Company violated § 8 (e) of the National Labor Relations Act (29 U.S.C. § 158 (e)) by agreeing to terminate the independent contractor status of Dealers who distributed the Company's newspapers and by permitting them to work, if at all, only as employees and Union members. The Board correctly found that "work preservation" was not the primary object of the contract termination provision, and in so doing it properly applied the rule of *National Woodwork Manufacturers Assoc. v. N.L.R.B.*, 386 U.S. 612 (1967).

Moreover, we hold that the Board, in the exercise of its expertise, properly refused to award compensatory damages or back pay to Dealers it ordered reinstated pursuant to § 10 (c) of the Act (29 U.S.C. § 160 (c)). When, and to what extent, damages may serve the policy of the National Labor Relations Act in a given case, is a complex problem for the Board to decide in the lights of its administrative experience and knowledge. The Board draws on a unique fund of expertise, and its choice of remedy must be given special respect by the reviewing courts. *Marriott Corp. v. N.L.R.B.*, 491 F.2d 367, 371 (CA9 1974). We see no abuse of the Board's discretion in its denial of compensation to Dealers, a group of independent contractors, not employees.

It is our considered judgment that the Board correctly applied 29 U.S.C. §§ 158 (e) and 160 (c) to the facts in the case and that its decision and order, reported as aforesaid, should be enforced. The petitions of Union and Dealers are denied.

The Board shall submit an appropriate order of enforcement.

IT IS SO ORDERED.

Appendix B

ORIGINAL

United States Court of Appeals
for the Ninth Circuit

NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL NO. 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 73-3595
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NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. SAN FRANCISCO NEWSPAPER PRINTING COMPANY, INC., *Respondent.*	No. 73-3597

JUDGMENT

Before: Chambers and Kilkenny, Circuit Judges, and Jameson, District Judge.*

*The Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

This cause came on to be heard upon a petition filed by Newspaper and Periodical Drivers & Helpers Union Local No. 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and a cross-petition filed by Douglas Brown, et al., to review an order of the National Labor Relations Board issued against Newspaper and Periodical Drivers & Helpers Union, Local No. 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, its officers, agents, and representatives, and San Francisco Newspaper Printing Company, Inc., its officers, agents, successors, and assigns, on June 25, 1973, and upon a cross-application and application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on November 13, 1974, and has considered the briefs and transcript of record filed in this cause. On December 23, 1974, the Court being fully advised in the premises, handed down its decision denying the petitions to review and enforcing the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

A. Petitioner Union, Newspaper & Periodical Drivers' & Helpers Union Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or attempting to enforce the provisions of section 1(b) of the March 22, 1968, supplemental agreement between Petitioner Union and Respondent Employer, as modified in 1969, to the extent said provisions are found to be unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the National Labor Relations Act, hereinafter called the Act:

(a) Post at its business office and meeting halls copies of the attached notice marked "Appendix A." Copies of said notice, on forms provided by the Regional Director for Region 20, (San Francisco, California), after being duly signed by a representative of Petitioner Union, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Petitioner Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner Union has taken to comply herewith.

B. Respondent Employer, San Francisco Newspaper Printing Co., Inc., San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or attempting to enforce the provisions of section 1(b) of the March 22, 1968, supplemental agreement between Petitioner Union and Respondent Employer, as modified in 1969, to the extent said provisions are found to be unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to any of the independent contractors, whose dealership contracts were terminated pursuant to the unlawful provisions of the supplemental agreement any time since 6 months before charges were filed in the instant proceeding, reinstatement of their dealership contracts.

(b) Post at its places of business copies of the attached notice marked "Appendix B." Copies of said notice, on forms provided by the Regional Director for Region 20,

after being duly signed by a representative of Respondent Employer, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondent Employer has taken to comply herewith.

Costs in favor of the Board.

COSTS: N.L.R.B. Brief	$212.00
Total	$212.00

Enforced, Judgment Filed and Entered
/s/ EMIL E. MELFI
Emil E. Melfi
Clerk

A True Copy,
Attest: Feb. 18, 1975
Emil E. Melfi
Clerk
by: /s/ SUSAN A. WHITE
Susan A. White, Deputy

Filed—Feb 18 1975
Clerk U. S. Court of Appeals

So Ordered:
/s/ RICHARD W. CHAMBERS
/s/ JAMES F. KILKENNY
as *Circuit Judges*
/s/ WILLIAM J. JAMESON
N.A.-District Judge

D-7268

APPENDIX A

NOTICE TO MEMBERS

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or attempt to enforce any agreement with San Francisco Newspaper Printing Co., Inc., requiring the termination of its contracts with dealers who are independent contractors and having such dealers retained, if at all, as employees subject to our collective-bargaining agreement with that employer.

Newspaper & Periodical Drivers' & Helpers Union Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415-556-3197.

D-7268

APPENDIX B

NOTICE TO EMPLOYEES

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or attempt to enforce any agreement requiring the contracts of dealers who are independent contractors to be terminated and the dealers retained, if at all, as employees subject to our colective-bargaining agreement with Newspaper & Periodical Drivers' & Helpers Union Local 921.

WE WILL offer to any of the dealers, whose contract terminations have been found unlawful, reinstatement of their dealership contracts.

San Francisco Newspaper Printing Co., Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415-556-3197.

Appendix C

FKP

204 NLRB No. 60

D-7268
San Francisco, Calif.

United States of America
Before the National Labor Relations Board

Newspaper & Periodical Drivers' &
Helpers Union Local 921, International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen & Helpers of America

and

San Francisco Newspaper Printing
Co., Inc.

and

Douglas Brown, an Individual	Case 20-CE-68
Walter De Long, an Individual	Case 20-CE-69
Phillip T. Walker, an Individual	Case 20-CE-70
Marvin W. Weissensee, an Individual	Case 20-CE-71
Kenneth C. Wollman, an Individual	Case 20-CE-72
John Roy Conway, an Individual	Case 20-CE-73
Leroy Lester Holbrook, an Individual	Case 20-CE-74
Darrell E. Baker, an Individual	Case 20-CE-76
Willis P. Kolb, an Individual	Case 20-CE-77

SUPPLEMENTAL DECISION AND ORDER

On November 8, 1971, the National Labor Relations Board issued a Decision and Order dismissing the complaint in the above-entitled proceeding, upon concluding that certain newspaper dealers, with whom it had been alleged the Respondent Employer had agreed to cease doing business, were employees of Respondent Employer and that therefore the relationship between the Employer and the dealers

was not controlled by Section 8(e) of the Act.[1] By so holding, the Board found it unnecessary to determine whether, assuming the dealers were not employees of Respondent Employer, the effectuation of an agreement requiring Respondent Employer to terminate its contracts with the dealers constituted a violation of Section 8(e).[2] Thereafter, the Charging Parties petitioned the United States Court of Appeals for the Ninth Circuit to review the Board's Order.

1. 194 NLRB No. 4.

On June 12, 1972, the court issued its decision, finding that the Board erred in concluding that the newspaper dealers were employees, finding instead that they were independent contractors and remanding the case to the Board to determine whether in light of the court's finding a violation of Section 8(e) had occurred.[3] On November 13, 1972, the Supreme Court of the United States denied a petition for writ of certiorari. Thereafter, the Board invited statements of position from the parties in light of the remand order. Such statements were received from the Charging Parties and Respondent Union.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

2. No issue has been raised as to the timeliness of the filing of the charges with respect to the limitation contained in Sec. 10(b) of the Act. The initial execution of the agreement in question between Respondent Employer and Respondent Union took place more than 6 months prior to the date the instant charges were filed and is therefore immune from attack in this proceeding. The implementation of the agreement within the 6-month period, with which we are here concerned, however, is not so immune. *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Local Union No. 695, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (John B. Threlfall d/b/a Threlfall Construction Company)*, 152 NLRB 577, 580; *Milk Drivers and Dairy Employees, Local Union No. 537 (Sealtest Foods, A Division of National Dairy Products Corporation)*, 147 NLRB 230, 231.

3. 462 F.2d 699.

The Board has again reviewed the entire record in light of the exceptions to the Trial Examiner's Decision, the briefs and statements of position, and the court's decision and makes the following additional findings and conclusions:[4]

As set forth more fully in the Trial Examiner's Decision attached to the Board's earlier Decision and Order, the Respondent Employer, a Newspaper publisher, distributes its newspapers throughout the Oakland-San Francisco metropolitan area. The distribution area is divided into "territories" and within each territory a person in charge of circulation hires or contracts with individual carriers (adults and boys) who make the actual home deliveries to subscribers. The persons in charge of the territories, or their carriers, also deliver to newspaper stands on the streets. Over the years, Respondent Employer has had successive collective-bargaining agreements with Respondent Union, covering the persons in charge of those territories lying within the geographical jurisdiction specified in the agreements. [This geographical jurisdiction increased gradually] until, under the agreement in effect when the instant charges were filed, it included the territories of the Charging Parties herein, who are some of the "dealers" found by the court in this case to be independent contractors. Prior to the agreement, the Union had attempted, unsuccessfully, to organize the dealers. Under the terms of the agreement, those dealers whose territories lie within the Union's expanded geographical jurisdiction would have their dealership contracts terminated according to a prescribed time schedule and would continue to function, if at all, as unit employees subject to the collective-bargaining agreement and its union-security clause. Whether they continued at all would be by mutual agreement between the Employer and themselves.

4. The court stated in its opinion: "We reverse and remand for a hearing on the merits." By this we take the court to mean that we are to determine, now that the dealers are to be viewed as independent contractors, whether Sec. 8(e) is violated by the application to them of the agreement before us. Since this issue was fully litigated we do not think the court intended to direct us to reopen the record for the taking of additional evidence and we are satisfied that the case is ripe for decision on the merits upon the existing record.

Member Kennedy, who dissented to the original Decision and Order herein, agrees that a remand to the Administrative Law Judge for preparation of a decision on the merits is unnecessary. There are no substantial credibility resolutions posed by the record herein and he agrees that the Board can now consider the case on its merits.

Pursuant to the agreement, the contracts of dealers Chain and Holbrook were terminated within the 6-month period prior to the filing of the instant charges. Further terminations pursuant to the collective-bargaining agreement were announced, but their implementation was restrained by court orders.

Unless justified by some legitimate primary objective, the provision requiring the termination of the independent contractor status of the dealers, allowing them to continue their work only as employees and union members, presumptively violates Section 8(e).[5] Thus, unless the contract terminations, which are in effect cessations of business, are merely incidental to the accomplishment of an objective relating principally to the terms and conditions of employment of employees in the bargaining unit, their thrust

5. *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Independent Owner-Operators, Inc.)*, 181 NLRB 515, 520-521, 529; *Milk Drivers and Dairy Employees, Local Union No. 537, supra*, 147 NLRB at 235-236.

is secondary and therefore prohibited by the Act.[6] Under the facts of this case, the issue remaining at this juncture is, as stated but never reached by the Administrative Law Judge,[7] whether the termination provision "has a primary work preservation objective so as to insulate it from a Section 8(e) violation."[8]

[The Union's claim of "work preservation" is based on the assertion that the job opportunities have been diminishing in the geographical area that was within its jurisdiction prior to the current collective-bargaining agreement.] In the Union's view, the shifting of the newspaper circulation away from the city and into suburban areas not previously within the Union's jurisdiction, has necessitated the Union's increasing its geographical jurisdiction in the suburbs in order to hold on to the work traditionally performed by unit employees.

In our view, however, the work preservation aspect of the contract terminations under attack here is incidental to the cessation of doing business instead of the other way around. Respondents assert that placing the work of the dealers under the substantive provisions of the collective-bargaining agreement will create more jobs.[9] But the agreement

6. Cf. *Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (S & E McCormick, Inc.)*, 159 NLRB 84, 101, reversed *sub nom. A. Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772 (C.A. 3, 1967), cert. denied 390 U.S. 905, Supplemental Decision and Order reported in 199 NLRB No. 63 (cited *infra* as *McCormick*).

7. The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

8. 194 NLRB No. 4, p. 7 (TXD).

9. Dealers who now work up to 7 days a week would henceforth work only 5.

does not require that the work of the dealers be given to employees from the preexisting unit. It permits retention of the former independent dealers to continue distributing newspapers and it is reasonable to expect that many of the dealers would be so retained. Thus, no substantial work opportunities would necessarily be added for employees from the preexisting unit, but rather there would be new employees who must become union members.[10] Furthermore, the unit would be expanded to cover geographical areas never within the unit, where any increase in the amount of work done by the independent dealers would not in itself cause any decrease in the amount of work available to unit employees.[11] No claim is made here that changing dealers into unit employees is necessary to preserve union standards within the unit or to discourage contracting of unit work.[12]

Noting also that the Union's president admitted that, after failing in attempts to organize the dealers, the Union "decided to do it by contract, by collective bargaining," we are persuaded that the provision for termination of the dealers' contracts is aimed principally at the nonunion independent dealers, not at the primary employer. The provision, as implemented, therefore, is secondary and unlawful under Section 8(e).

10. Cf. *Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck Terminal Employees, Local Union No. 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Wilson & Co.) v. N.L.R.B.*, 335 F.2d 709 (C.A.D.C., 1964). Without deciding what weight it is entitled to, we also note that in *Wilson*, unlike the instant case, the primary employers had, by moving their operations, caused the loss of the work the union was seeking to recapture through the agreement in question.

11. Cf. *McCormick, supra*, 159 NLRB at 98.

12. *Id.* at 100.

The Remedy

We shall order Respondents to cease and desist from any effectuation of the agreement to terminate nonunion dealers who are independent contractors and to post appropriate notices to that effect. In addition, since certain dealers were actually terminated pursuant to the agreement, we shall order that Respondent Employer offer to reinstate their dealership contracts. In the circumstances of this case we think such action will adequately effectuate the purposes of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Union, Newspaper & Periodical Drivers' & Helpers Union Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or attempting to enforce the provisions of section 1(b) of the March 22, 1968, supplemental agreement between Respondent Union and Respondent Employer, as modified in 1969, to the extent said provisions are found to be unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business office and meeting halls copies of the attached notice marked "Appendix A."[13] Copies of

13. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

said notice, on forms provided by the Regional Director for Region 20, after being duly signed by a representative of Respondent Union, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

B. Respondent Employer, San Francisco Newspaper Printing Co., Inc., San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or attempting to enforce the provisions of section 1(b) of the March 22, 1968, supplemental agreement between Respondent Union and Respondent Employer, as modified in 1969, to the extent said provisions are found to be unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to any of the independent contractors, whose dealership contracts were terminated pursuant to the unlawful provisions of the supplemental agreement any time since 6 months before charges were filed in the instant proceeding, reinstatement of their dealership contracts.

(b) Post at its places of business copies of the attached notice marked "Appendix B."[14] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by a representative of Respondent

14. See fn. 13.

Employer, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent Employer has taken to comply herewith.

Dated, Washington, D.C. Jun 25 1973

(Seal)

.....
Edward B. Miller, Chairman

.....
Ralph E. Kennedy, Member

.....
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or attempt to enforce any agreement with San Francisco Newspaper Printing Co., Inc., requiring the termination of its contracts with dealers who are independent contractors and having such dealers retained, if at all, as employees subject to our collective-bargaining agreement with that employer.

Newspaper & Periodical Drivers' &
Helpers Union Local 921, International Brotherhood of Teamsters,
Chauffeurs, Warehousemen &
Helpers of America
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

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APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or attempt to enforce any agreement requiring the contracts of dealers who are independent contractors to be terminated and the dealers retained, if at all, as employees subject to our collective-bargaining agreement with Newspaper & Periodical Drivers' & Helpers Union Local 921.

WE WILL offer to any of the dealers, whose contract terminations have been found unlawful, reinstatement of their dealership contracts.

San Francisco Newspaper
Printing Co., Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

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Appendix D

THE ALLEGED UNLAWFUL CLAUSE OF THE 1968 AGREEMENT

Section 1.

(a) This Agreement, except as hereinafter otherwise provided, applies to all employees employed within the cities of San Francisco, South San Francisco, San Bruno, Millbrae, Burlingame, San Mateo, Foster City, Oakland, Berkeley, Alameda, Albany, El Cerrito, San Leandro, Belmont, San Carlos, Pacifica, Castro Valley, San Lorenzo, Redwood City, Atherton, Menlo Park, and Hayward—including roadmen operating within a radius of fifty (50) miles of San Francisco—whose work is to promote the sale of, distribution of and the collection for the Employers' product through the medium of carrier boys, news boys, news vendors and news stands, including those full time employees performing dispatching. Provided, nothing herein contained shall be construed to interfere with part time dispatchers as now employed.

• • •

(b) It is agreed that Section 1 (a) be subject to modification in accordance with the following terms:

(1) The Union's jurisdiction shall be extended to include:

Morning Newspaper	Effective Date	Afternoon Newspaper
East Menlo Park		
East Palo Alto	4-1-68	
Palo Alto	7-1-68	
South Palo Alto	10-1-68	
Mountain View		
W. Mountain View	1-1-69	
Moffett Field		
Baron Park	4-1-69	
Los Altos		
No. Sunnyvale	7-1-69	
Sunnyvale	9-1-69	Sunnyvale
Santa Clara	1-1-70	Santa Clara
Cupertino	3-1-70	
W. San Jose	7-1-70	W. San Jose
Campbell	10-1-70	Santa Clara Streets
Monte Vista	1-1-71	
Central San Jose		
Corte Madera	3-1-71	Central San Jose
Almaden		
Kentfield	7-1-71	San Jose Streets
East San Jose*		
Foothills*		
San Anselmo	9-1-71	
(*Milpitas and E. San Jose hills excluded)		
Fairfax		
San Rafael	1-1-72	
East San Rafael	4-1-72	
South San Rafael	7-1-72	

(2) The dealer in any one or all of the above designated cities whose contract is terminated in accordance with the above terms shall, at the Employer's option, be permitted to continue in that same territory as an employee working under Union jurisdiction and so long as he remains continuously employed in the same territory shall not be subject to replacement in accordance with the seniority provisions of Section 26 but in all other respects shall be subject to the terms of this Agreement.

Appendix E

The communities in which the Union extended its jurisdiction with respect to wholesalers in chronological order, prior to the alleged unlawful agreement.

South San Francisco	1956	(GC 44)
San Leandro	1957	(GC 44)
Albany	1958	(GC 44)
El Cerrito	1958	(GC 44)
San Bruno	1960	(GC 48)
Millbrae	1960-61	(GC 48, 49)
Burlingame	1960-61	(GC 48, 49)
San Mateo (City)	1962	(GC 49)
Foster City	1962	(GC 49)
San Carlos	1966	(GC 50)
Belmont	1966-68	(GC 2)
Pacifica	1966-68	(GC 2)
Castro Valley	1966-68	(GC 2)
San Lorenzo	1966-68	(GC 2)
Redwood City	1967	(GC 2)
Atherton	1967	(GC 2)
Menlo Park	1968	(GC 2)
East Palo Alto	1968	(GC 2)
Palo Alto	1968	(GC 2)
Palo Alto	1968	(GC 2)
Southern Palo Alto	1968	(GC 2)
Mountain View	1969	(GC 2)
Moffett Field	1969	(GC 2)
Baron Park	1969	(GC 2)
Los Altos	1969	(GC 2)